APPEAL NO. 93903

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held in (city), Texas, on July 26, 1993, to determine the claimant's date of maximum medical improvement (MMI) and impairment rating. The hearing officer, (hearing officer), basically determined that none of the reports of the three doctors who found MMI and impairment were valid, and that accordingly a dispute still exists regarding the claimant's date of MMI and impairment rating.

At the hearing the carrier, who is the appellant in this action, raised a plea to the jurisdiction based on two arguments. First, it contended, the issue of MMI was never appealed by either party and as such the hearing officer's original determination of MMI on November 29, 1991, became final. Second, it argued that the 1989 Act allows the Appeals Panel, to which this case has been appealed on two prior occasions, to reverse and remand a decision no more than one time for further consideration and development of evidence. Because the Appeals Panel previously reversed the decision of the hearing officer and rendered a decision that a determination of MMI and impairment had not been made at that time, and because the time for appealing such decision to district court has elapsed, carrier argued, the decision of the Appeals Panel has become final and the Texas Workers' Compensation Commission (Commission) has no further jurisdiction to develop evidence in this case. The carrier advances basically the same arguments in its appeal. No response was filed by the claimant.

DECISION

We reverse the hearing officer's decision and order and render a new decision that the claimant reached MMI on August 24, 1992, with a 29% impairment rating as determined by the designated doctor.

Before addressing carrier's legal arguments in the instant appeal, a summary of the prior decisions is necessary.

Two issues were before the hearing officer at a hearing concluded on October 19, 1992: when did the claimant reach MMI and what is his impairment rating. Several medical reports, including that of (Dr. P), the designated doctor, were in evidence. The first doctor to find that the claimant had reached MMI was (Dr. G), who examined claimant on June 11, 1991, at carrier's request, and issued a report dated November 29, 1991, certifying MMI as of that date with a 14% impairment rating. The claimant pointed out that Dr. G's narrative attached to his Report of Medical Evaluation (Form TWCC-69) states that Dr. G's opinion "is based on the presumption that the patient has not completely improved from his previous injuries. I only saw the patient once, in June 1991." The hearing officer determined that Dr. G's report, while on the proper form, did not otherwise meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3 (Rule 130.3). Claimant's treating doctor, (Dr. H), certified that claimant reached MMI on June 22, 1992, with a 44% whole body impairment rating. Dr. P, appointed by the Commission, assessed

a 29% impairment without certifying MMI. The hearing officer determined that the great weight of the medical evidence indicates that claimant reached MMI on November 29, 1991, the date determined by the carrier's doctor, Dr. G, but that the designated doctor's assessment of a 29% impairment rating would be accepted. At the carrier's request, the claimant also saw (Dr. B), who found claimant reached MMI on April 15, 1992, with a "C spine total body" rating of 15% and a "total body for right arm" impairment of eight percent. The claimant argued at the hearing that Dr. B's report was invalid because it states that the impairment ratings were "[t]aken from the Orthopedic Guidelines to Physical Impairment," and thus were not based upon the American Medical Association's Guides to the Evaluation of Permanent Impairment, second printing, dated February 1989, third edition (AMA Guides). *See* Section 408.124. The hearing officer made no findings of fact concerning Dr. B's report.

The carrier, which stated that they did not contest or dispute the hearing officer's determination as to the date of MMI, appealed the hearing officer's decision as to the impairment rating, contending that the report of the designated doctor, as well as the claimant's treating doctor, were improper, incomplete, and not based upon the 1989 Act or the rules of the Commission.[1] In support of its argument, the carrier contended that the evidence shows that Dr. H did not use the statutorily authorized version of the AMA Guides, and that Dr. P's report references a report by a rehabilitation hospital which indicates that personnel of that hospital incorrectly used the AMA Guides, Revised 3rd Edition, copyright 1990. The carrier also argued that neither Dr. P nor Dr. H specifically referenced claimant's prior injuries, despite the fact that both had claimant's complete medical records. Finally, the carrier said Dr. P's report contained fatal defects, such as the failure to certify MMI, and the fact that Dr. P relied upon the report of a rehabilitation hospital. The claimant neither filed a response nor a cross-appeal. The Appeals Panel, in Texas Workers' Compensation Appeal No. 92627, decided January 7, 1993, reviewed the record in the case and agreed with the carrier that the designated doctor's report was potentially faulty on two grounds: first, that it was not clear whether the doctor used the statutorily-prescribed version of the AMA Guides, as the evidence showed that that doctor relied at least in part upon the assessment of a rehabilitation center which did not use the proper version of the AMA Guides; and second, that because the designated doctor had been appointed to determine both MMI and impairment, it was necessary for the hearing officer to determine from the designated doctor whether he believed MMI had been reached. The case was thus reversed and remanded to allow further evidence to be adduced on these two points.

On remand, the hearing officer, following written communication with the designated doctor, determined that that doctor certified MMI on the date he examined the claimant, and that he used the statutorily-prescribed version of the AMA Guides. She therefore held that the claimant reached MMI on August 24, 1992, with a 29% whole body impairment rating.

Once again, the carrier appealed on the following grounds: that the hearing officer

[1]The carrier raised other points of appeal which were rejected by the Appeals Panel and which are not pertinent to the instant decision.

erred in rendering a decision on remand without opportunity for a hearing and in considering "secret" evidence without allowing the parties an opportunity to rebut such evidence; that the hearing officer erred in determining the date claimant reached MMI, since this was not an issue on remand and neither the hearing officer nor the Appeals Panel had further jurisdiction over this issue; that it was further error for the hearing officer to determine MMI because the designated doctor had not complied with Commission rules; and that the 29% impairment rating was error as it was based upon an incomplete Form TWCC-69 and "secret" evidence, and was contrary to the great weight and preponderance of the evidence.

In Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993, the Appeals Panel agreed with the carrier that the failure to provide the parties with new evidence considered by the hearing officer in making her decision was error, citing case law that provides that the right to examine and rebut evidence is not confined to court trials but applies also to administrative hearings. The panel noted that a prior decision had reversed and remanded to the hearing officer a case in which there was no indication that the parties had received a designated doctor's report or were permitted to respond to it, despite the fact that the hearing officer's decision was based upon the report. However, because the instant case had previously been before the Panel, and because the 1989 Act provides that the Appeals Panel may reverse a decision and remand no more than one time to the hearing officer for further consideration, we held that the statute limited us at that point from taking any action other than reversing and rendering a decision that a proper and sufficient determination of MMI and impairment rating had not been made. We stated, however, that this case may be one which may appropriately proceed directly to a contested case hearing pursuant to the 1989 Act and Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.5(b).

Thereafter, a contested case hearing was convened on July 26, 1993, to determine the issues of claimant's date of MMI and impairment rating. At this time, the hearing officer's correspondence with Dr. P, having been made available to the parties, was admitted into evidence, along with a June 19, 1991, report detailing claimant's June 11, 1991, examination by Dr. G, which did not find MMI or assess an impairment rating, and a Payment of Compensation or Notice of Refused/Disputed Claim (Form TWCC-21) filed by the carrier. All the exhibits from the prior hearing, as well as the decisions of the hearing officer and the Appeals Panel, and the requests for review filed by the carrier, were also made part of the record. The correspondence from Dr. P stated that "[i]n my opinion, I first examined [claimant] on August 24, 1992, and thats (sic) when I felt he has reached maximum medical improvement." The hearing officer also made the following inquiry: "Section 4.24 of the Texas Workers' Compensation Act requires that the second printing, dated February, 1989, of the Guides to Evaluation of Permanent Impairment, third edition, be used in assessing impairment ratings. Could you please confirm for me that this is the edition of the Guides you used; and, if you used the revised third edition, could you please pull out the older edition required by the law, determine if any changes in the impairment rating would be necessary, and either confirm the 29% previously assigned or assign a new impairment rating." In response, Dr. P stated that "I would like to mention that I did use 1989 Guides to Evaluation of Permanent Impairment, third edition in the case of [claimant]. My opinion still stands the

same. He retains a 29% impairment rating."

Based on the foregoing, the hearing officer found that Dr. P's certification of MMI and assignment of impairment rating is not valid because it was based on the AMA Guides, revised third edition (1990), used by the rehabilitation hospital and was not based on the second printing, third edition, required by the statute. She also repeated her finding that Dr. H relied on the incorrect version of the AMA Guides, and made new findings that Dr. G's certification of MMI and impairment was invalid because it gave a prospective date of MMI. Thus, she determined that a dispute still exists regarding claimant's date of MMI and impairment rating, and she sent the case back to a disability determination officer for the appointment of a designated doctor to properly evaluate the claimant and assign a date of MMI and an impairment rating.

The carrier bases its appeal on provisions contained in the 1989 Act concerning the Appeals Panel and judicial review of Appeals Panel decisions, which provide in pertinent part as follows:

Sec. 410.203. Powers and Duties of Appeals Panel; Priority of Hearing on Remand

* * * *

(b)An appeals panel may:

(1)affirm the decision of the hearing officer;

(2)reverse that decision and render a new decision; or

(3)reverse that decision and remand the case to the hearing officer for further consideration and development of evidence.

(c)An appeals panel may not remand a case under Subsection (b)(3) more than once.

Sec. 410.204. Decision.

(a)An appeals panel shall issue a decision that determines each issue on which review was requested. The decision must be in writing and shall be issued not later than the 30th day after the date on which the written response to the request for appeal is filed. . . .

Sec. 410.251. Exhaustion of Remedies. A party that has exhausted its administrative remedies under this subtitle and that is aggrieved by a final decision of the appeals panel may seek judicial review under this subchapter. . . .

Sec. 410.252. Time for Filing Petition; Venue.

(a)A party may seek judicial review by filing suit not later than the 40th day after the date on which the decision of the appeals panel was filed with the division. . . .

Based upon these statutory provisions, the carrier argues, the Appeals Panel--and indeed the Commission as a whole--has lost jurisdiction over this case, due to the fact that it has twice been before the Appeals Panel and no judicial review has been sought within the 40 days following the decision in Appeal No. 93323, *supra*.

As carrier correctly notes, the purpose behind the limited number of times an active issue or issues could be remanded by the Appeals Panel to a hearing officer has been stated as "to eliminate the possibility that some comp dispute/issue might be bounced back and forth between a CCH hearing officer and the AP, and thereby delay final resolution and/or timely payment of benefits ultimately determined to be due. In this regard the `once only' remand limitation is a part of the overall Article 6 expediting plan." *See* Montford, A Guide to Texas Workers' Compensation Reform, Vol. 1, pp. 6-157-158, Butterworth Legal Publishers, 1991.

Clearly, expediting the dispute resolution process was a key reform of the 1989 Act. However, the administrative and judicial review provisions cannot be looked to in a vacuum in determining legislative intent. A cardinal rule of statutory construction is that all the language and every part of a statute must be given effect and construed together in harmony. As the Texas Supreme Court has stated:

[t]he dominant objects sought to be expressed in statutes can be stated only in general terms, and the rule of common sense should govern those called upon to construe and enforce them. It is impossible to pick out certain words or phrases or sentences, and detach them from the context of the law, and when thus isolated define them and arrive at the intention of the Legislature expressed in the law. A statute should be construed as a whole in order to arrive at the purposes for which it was enacted.

National Surety Corporation v. Ladd, 131 Tex. 295, 115 S.W.2d 600, 603 (1938).

Another new, and equally key, provision of the 1989 Act concerns the designated doctor procedures. *See* Sections 408.122, 408.125. It is the designated doctor who is responsible for rendering an opinion resolving disputes over whether and when a claimant reached MMI, and the claimant's correct impairment rating. The Act takes the extraordinary step of providing that this doctor's opinion is entitled to presumptive weight, and states that the Commission "shall" base its determination of MMI and impairment upon that doctor's report, "unless the great weight of the other medical evidence is to the contrary." As this Panel has held, no other doctor's report, including that of the treating doctor, is accorded this special, presumptive status. Texas Workers' Compensation Commission Appeal No.

92366, decided September 10, 1992. Because of the great deference accorded this doctor's report, this Panel also has ruled many times that where a party timely alleges defects in the designated doctor's report, the hearing officer has the responsibility to "directly seek out the doctor's answers to questions that are deemed essential to understanding the report." Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992.

Also new to the 1989 Act is the requirement that any impairment rating be based upon the third edition, second printing, dated February 1989, of the AMA Guides. Section 408.124. The requirement that this version of the AMA Guides be used has been determined to be inexorable. Texas Workers' Compensation Commission Appeal No. 93028, decided February 26, 1993. The issue of the various doctors' use of the correct version of the AMA Guides having been raised by both parties in this case, the hearing officer properly considered that issue. For the non-designated doctors, the hearing officer correctly looked to the reports of those doctors; with regard to the designated doctor, the hearing officer pursuant to remand sought clarification as to the version of the AMA Guides used by that doctor. Had the hearing officer's decision on remand not been based on evidence which the parties had not seen or had opportunity to comment on, this Panel would have rendered its decision upon review of the evidence and the hearing officer's determination. Such procedural error, however, prevented a final decision on MMI and impairment from being made at that time. The Appeals Panel did, however, render a final decision that no decision on the two issues could be made, and it in essence dismissed the case without prejudice to the two parties.

By this action, carrier argues, the Appeals Panel, and presumably the Commission as a whole, has forfeited the authority ever to make a determination on these issues. Such interpretation of the statute leads to a patently absurd result. The action taken in this case is analogous to those in which a determination has been made that an issue, such as appointment of a designated doctor, is not ripe for resolution due to a failure to follow proper procedural requirements. *See* Texas Workers' Compensation Commission Appeal No. 92176, decided June 10, 1992. The carrier's argument also ignores the possibility that a decision in a case could not be made upon a particular set of facts because no doctor had correctly determined MMI or impairment in accordance with the statutory prescriptions. Along these lines, *see* Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; in that case the Appeals Panel had reversed and remanded for further development of the evidence where there was great disparity between the impairment ratings determined by claimant's treating doctor and by the designated doctor. The case returned to the Appeals Panel, which reviewed the new evidence (a deposition of the designated doctor) and determined that that doctor incorrectly applied the AMA Guides. As Chief Judge (S) wrote in the decision, "[The designated doctor] indicated that the range of motion assessment is very difficult to do and he preferred to use just the specific disorder table. Unfortunately, the result is an invalid impairment assessment and rating . . . [a]nd, although it is open to question, the evidence does not establish that the treating doctor used the Guides in his assessment of impairment. . . . For the foregoing reasons, the decision of the hearing officer is reversed and a new decision is rendered that the designated doctor

did not correctly follow or apply the Guides in arriving at his impairment rating of the claimant and that his impairment rating is, accordingly, not valid. The Commission may appropriately undertake to obtain a valid impairment rating from a designated doctor correctly applying the protocol of the Guides."

To a great extent, carrier's jurisdictional argument is based upon the perception that further action was taken by the hearing officer in this case upon remand subsequent to the Appeals Panel's decision in Appeal No. 93323 and that as such the hearing officer was "bereft by law" to make her determination. Rather, due to the presence of both procedural and substantive error in the original case, it was necessary for the parties to begin anew the process to seek resolution of the issues. Because of the unfortunate circumstances of this case, as well as the passage of time since the case arose, this Panel suggested in Appeal No. 93323 that this case would be an appropriate one for the expedited procedures contemplated by the 1989 Act and the Commission's rules. In this regard, it would have been equally appropriate for the hearing officer, upon convening the July 26, 1993, hearing, to recess the case and refer it to a disability determination officer for appointment of another designated doctor prior to reaching her decision. That she chose to take this step after reviewing the evidence from the prior hearings, as well as new evidence in the form of the letters from Dr. P, is certainly acceptable procedurally, although it clearly left the carrier with the impression that another remand hearing was being held.

In short, the carrier's appeal would have the Appeals Panel under the circumstances of this case and Appeal No. 93296, *supra*, ignore errors of both a procedural (inclusion into the record of evidence uncirculated to the parties) and substantive (failure of doctors to comply with requirements of the 1989 Act) nature and render a decision due to an isolated reading of provisions regarding appellate and judicial review, and without recourse to consideration of any other part of the statute. Such interpretation could lead to an absurd result and one which the legislature arguably did not contemplate. It is well settled that statutory provisions should not be construed so as to lead to such results. Cramer v. Sheppard, 140 Tex. 271, 167 S.W.2d 147 (1942).

We likewise find no merit in carrier's contention that the issue of the claimant's date of MMI has become final because it was not specifically appealed by the carrier following the hearing officer's initial decision. As noted above, the carrier in its original appeal attacked the designated doctor's report based on its failure to certify MMI. And, as we also stated above, the hearing officer was obligated to, and properly did, request further information from the designated doctor in an attempt to determine whether that report had been properly executed and to take corrective action to cure any defects in such report. Because the law requires the hearing officer to give presumptive weight to that report, and because the designated doctor in this case was appointed to determine both MMI and impairment, the first issue was still in suspense throughout further action in this case. The carrier, having raised the issue of MMI in conjunction with the designated doctor, cannot avoid a determination on MMI based upon either the report of the designated doctor, or another doctor's report if such is found to be the great weight of the medical evidence to the contrary, merely by stating that it does not appeal the issue of MMI. As this Panel has

stated, "A finding of MMI is necessary to give rise to the entitlement to impairment income benefits . . . [a]lthough the 1989 Act sets out provisions regarding the reaching of, and the resolution of disputes about, MMI in [Section 408.122(b)] and provides for the resolution of disputes concerning impairment ratings in [Section 408.125(e)], the two matters may become somewhat inextricably tied together." Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

Turning to the merits of the hearing officer's decision in this case, we observe that Dr. P unequivocally states in his March 17, 1993, letter that ". . . I did use the 1989 Guides to Evaluation of Permanent Impairment, third edition, in the case of [claimant]." We believe that this evidence is sufficient to establish that Dr. P used the correct version of the AMA Guides, and that the hearing officer's decision to the contrary is against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The decision and order of the hearing officer are therefore reversed and a new decision rendered that the claimant reached MMI on August 24, 1992, with a 29% impairment rating as determined by the designated doctor.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge